

#1552

**Arbitration Decision and Award in the matter  
Of Arbitration Between:**

**Ohio Department of Public Service  
Investigative Unit**

**And**

**The Fraternal Order of Police  
Ohio Labor Council Inc.  
Unit 2**

**Case # 15-00-20010322-0034-05-02  
Grievant: Mr. Paul Klosterman**

**E. William Lewis  
Arbitrator**

Hearing date:	November 14, 2001
Briefs received:	December 14, 2001
Decision issued:	January 10, 2002

**Representing the Employer:**

**Representing the Union:**

**Ms. Neni Valentine  
Labor Relations Specialist  
Office of Collective Bargaining**

**Mr. Paul Cox  
Chief Council  
F.O.P., Ohio Labor Council**

## **APPEARANCES:**

The hearing was convened by the arbitrator at 10:00am at  
the Office of Collective Bargaining in Columbus, Ohio.

In attendance:

for the Union:

Mr. Paul Cox	Chief Council
Mr. Joel Barden	Sr. Staff Representative
Ms. Renee Engelbach	Para Legal
Mr. Paul D. Klosterman	Grievant

for the Employer:

Ms. Nina Valentine	Labor Relations Specialist
Ms. Beth A. Lewis	Operations Team Leader
Mr. Terry Williams	Assistant Agent in Charge
Mr. Michael J. Smith	Enforcement Agent
Ms. Marcella L. Kindle	Secretary, Columbus District
Mr. Timothy Gales	Enforcement Agent

The parties were asked to submit exhibits into the record. The following were submitted as Joint Exhibits:

Joint Exhibit #1	Collective Bargaining Agreement
Joint Exhibit #2A	Notice of intent to suspend dated 2/9/01
Joint Exhibit 2B	Pre-disciplinary meeting findings dated 2/16/01
Joint Exhibit 2C	7 day suspension notice dated 2/23/01 effective 2/27/01
Joint Exhibit 2D	DISCIPLINE ABEYANCE AGREEMENT-signed 5/19/01
Joint Exhibit 2E	3 day suspension notice dated 2/23/01-effective 3/8/01
Joint Exhibit 3A	Grievance report form dated 3/18/01
Joint Exhibit 3B	Step 2 grievance answer by Renee Macy
Joint Exhibit 3C	Notice to arbitrate-dated 5/1/01
Joint Exhibit 4	Personnel Department Record

The following were submitted as employer exhibits:

Management Exhibit 1	Supplemental work rules— Performance of duty & Conduct
Management Exhibit 2	Discrimination & Unlawful Harassment Policy

Management Exhibit (Attachment 1)	3	E-Mail copy of "Ebonic Night Before Christmas"
Management Exhibit	4	Summary, Administrative Investigation 00-244 dated 1/16/01
Management Exhibit	5	Copies of pages 210&211 from "Spoken Soul" book
Management Exhibit	6	Copy of page 212 from "Spoken Soul" book

The following were submitted as union exhibits:

Union Exhibit	1	Interview Summary Michael J. Smith, Agent
Union Exhibit	2	Interview Summary Marcella Kindle, Secretary

## **Introduction:**

This matter was heard in Columbus, Ohio on November 14, 2001. All witnesses were sworn. No procedural issues were raised. The parties stipulated that a Discipline Abeyance Agreement dated May 19, 2000 was to be included as part of this hearing and findings.

## **Issue:**

Was the grievant issued a ten day (including three days held in abeyance) suspension for just cause? If not, what should the remedy be?

## **Position of the Employer:**

The employer maintains that the grievant was justly suspended for ten days for violating department rules. By bringing in to work an E-mail entitled "Ebonic Night Before Christmas" the grievant violated rules H (1) (a) and I (2). The rules state:

### **PERFORMANCE OF DUTY & CONDUCT**

#### **H. Conduct Unbecoming an Officer**

1. "An employee may be charged with conduct unbecoming

an officer in the following situations:

- a. For conduct that may bring discredit to the Department of Public Safety, its Divisions, or its members."

**I. Sexual Harassment & Discrimination**

2. "An employee shall not make disparaging comments, statements or gestures regarding other employees or the public, based on race, religion, color, national origin or sex."

The ten days included three days held in abeyance from an earlier (5/19/00) agreement for a violation of the same work rule H (1) (a) Conduct Unbecoming an Officer.

Agent Klosterman willfully shared this offensive and racist material with at least two other coworkers encouraging one to read the offensive material out loud. He is responsible for his behavior and in the light of his earlier violation of the same rule (H (1)(a) the ten day suspension should be sustained.

**Position of the Union:**

Management does not prove the charge. The grievant did not violate Department rules H(1)(a) **Conduct Unbecoming an Officer** and I (2) **Discrimination**. The grievant, Agent Klosterman, made only one copy of the document "**Ebonic Night Before Christmas**" and shared it with only two other coworkers. He did

not disseminate the document and he had no intent of being offensive or discriminatory.

Agent Gales was probably the one who disseminated the document. The union believes that Agent Gales, who said he was offended by the document, actually had a grudge against the grievant.

The union requests that the ten days pay be restored, make the grievant whole and clear his record.

## **FACTS:**

The grievant, Mr. Paul Klosterman, is employed by the Department of Public Safety of the State of Ohio. He works in the Investigative Unit of Liquor Control in the Columbus District Office. Mr. Klosterman is an Enforcement Agent and has been with the Department since September 13, 1999. On November 14, 2000 an incident occurred which led to the discipline.

The employer, as a result of the alleged incident charged the Grievant (Mr. Klosterman) with violating the Department Supplemental work rules, specifically—PERFORMANCE OF DUTY & CONDUCT. The particular rules the grievant allegedly

violated, according to the employer, were H. 1.a.(Conduct Unbecoming an Officer) and I. 2.(Sexual Harassment & Discrimination ).

As a result of an employee complaint an Administrative Investigation was conducted and the grievant was issued a letter of intent to discipline on February 9, 2001. On February 16, 2001 a pre-disciplinary hearing was held. It was attended by the grievant, an F.O.P. representative and management representatives. The Meeting Officer notified the Department Director that he found a violation of rules H. 1. a. and I.2. The Director notified Agent Klosterman on February 23, 2001 that he would be suspended on February 27, 2001 for ten working days.

The Union filed a written grievance on March 18, 2001 at Step 2. The union charged the Employer with violating the Disciplinary Procedure, specifically, Articles 19.01 Standard and 19.05 Progressive Discipline. The two provisions read as follows:

**19.01 Standard**

“No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause.”

**19.05 Progressive Discipline**

“The employer will follow the principles of progressive



discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:

1. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. One or more fines in the amount of one(1) to five(5) days pay for any form of discipline. The first time fine for an employee shall not exceed three (3) days pay;
4. Suspension;
5. Leave reduction of one or more day(s);
6. Working suspension;
7. Demotion;
8. Termination.

However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages."

## **DISCUSSION:**

The incident or action on the part of the grievant that allegedly took place was: bringing to the workplace on November 14, 2000 an E-mail entitled, "Ebonic Night Before Christmas".

The testimony from all five witnesses, including the grievant, established that the grievant did, in fact, bring such E-mail to the workplace. It was further testified to, and corroborated by the

grievant, that he shared the E-mail with at least two other employees (Mr. Smith & Ms. Kindle). The E-mail was read aloud by Ms. Kindle, with the grievant's approval or encouragement, and heard by at least two or three additional co-workers, according to witness testimony.

Agent Gales, an African American co-worker, overheard the aloud reading from his work area nearby. He testified that he was offended by the E-mail and he obtained a copy from a co-worker. Mr. Gales, according to his testimony, took the E-mail and his complaint to his immediate supervisor stating that he felt the E-mail to be racist and demeaning to black American males. Ms. Kindle, an African American, also testified that she was somewhat offended by some of the words in the E-mail. Mr. Gales requested that management address the perceived transgression.

Management addressed the issue in the next staff meeting and an Administrative Investigation was conducted.

Additional copies of the E-mail were made and distributed but it was never established that the grievant was involved in copying or the distribution. In fact the grievant testified that he made no copies

and no evidence was brought forward through testimony or otherwise that would refute his testimony.

The extensive distribution of this E-mail was established but the distributor was not established. It is not difficult for the arbitrator to understand how this particular E-mail could be offensive and certainly in bad taste for a workplace.

## **OPINION & AWARD**

What further exacerbates the situation for the grievant, in the Arbitrator's opinion, is that he is relatively new to the Department of Public Safety. He came to the Department on September 13, 1999 and shortly thereafter (2/4/00-Department Record) was charged with distributing sexually explicit material. A violation of Department of Public Safety work rule H. 1. A. Conduct Unbecoming an Officer was found. A DISCIPLINE ABEYANCE AGREEMENT was reached (5/19/00) in this case between the union, grievant and management. A five day suspension was imposed with three days being held in abeyance pending any future similar occurrences within the next two years.

In less than six months from the abeyance agreement the

grievant violates the same rule. All the testimony corroborates the act which gave rise to the discipline. In today's times of heightened sensitivity and awareness of what is proper social workplace conduct the grievant's act was certainly unbecoming any public employee. Whether the "poem" Ebonic Night Before Christmas is discriminatory according to the law may be debatable. It could, no doubt, be seen as derogatory.

For a relatively new employee to have two incidents of this nature is concerning to the arbitrator. Considering the grievant's length of service and past discipline I do not find that the penalty is excessive, unreasonable or that management has abused its discretion <sup>(1)</sup>.

The grievance is denied.

This concludes the arbitration decision.

(1)  
(Elquori&Elquori-5<sup>th</sup> Ed. Pg.910; Review of penalties imposed by management)  
(Enterprise Wire Co., Tests for "just cause". 46LA359)

*E. William Elms*  
*Arbitrator*

ATTACHMENT 1

Subj: Fw: Ebonic Night Before Christmas

Date: 11/10/00 6:22:11 PM Pacific Standard Time

From: dporcell@bellsouth.net (ThePorcellis)

rimhd@aol.com (Jan Mundt), PDKCFK@aol.com (Charlene Klosterman), Kathy.Faile@ipaper.com (Kathy Faile)

— Original Message —

From: "Debbie Cook" <drc0704@yahoo.com>

To: "Ed and Linda Rone" <BfoEd@aol.com>

Sent: Friday, November 10, 2000 10:01 AM

Subject: Fwd: Ebonic Night Before Christmas

> > Ebonic Night Before Christmas

> >

> > Wuz de nite befo Crimmus;

> > And all ower da hood;

> > ereybody wuz' sleepin';

> > Dey wuz sleepin' good.

> >

> > We hunged up our stockings;

> > An hoped like de' heck;

> > That old Santa Clause;

> > Be bringin' our check.

> >

> > All o'de fambily;

> > Wuz layin in de beds;

> > While Ripple and Thunderbird;

> > Danced through dey heads.

> >

> > I passed out inna' flo;

> > Right nex to my Maw;

> > When I heard sech a fuss;

> > I thunk: "It mus be de law!!!"

> >

> > I looked out thru de bars;

> > What covered my doe;

> > 'spectin' de sheriff;

> > Wif a warrent fo sho.

> >

> > And what did I see;

> > said, "Lawd look at dat!!"

> > Ther' wuz a huge watermelon;

> > Pulled by giant warf rats!!

> >

> > Now ober all de years;

> > Santa Clause, he be white;

> > But looks liken us bros;

> > Gets a black Sanna dis nite.

> >

> > Faster dan a Po'lees car;

> > My home boy he came;

> > He whupped on dem warf rats;

> > An' called dem by name!

> >

On Leroy, on 'Lonzo ;

> > And on Willie Lee;

> > On Saphire, on Chenequa;

> > Dey wuz a site to see!!

> >

> > As he landed dat watta' mellon;

> > Out der in da skreet;

> > I knowed it was fo' sho';

> > Da damndest site I ebber did see.

> >

> > He didn't go down no chimbley;

> > He picked da' lock on my doe;

> > An' I sez to myself;

> > "Shit!! He done dis befoe!!!"

> >

> > He had dis big bag;

> > Full of prezents I 'xpect;

> > Wid Air Jordans and fake gold;

> > To wear roun' my neck.

> >

> > But he left no good prezents;

> > Jus started stealing my shit;

> > Got my drugs, got my guns,

> > Even got my burglar's kit!!

> >

> > Wit my stuff in de bag;

> > Out da window he flewed;

> > I woudda' tried to catched him;

> > But he stoled my 'nife tool!

> >

> > He jumped on dat wadda' mellon;

> > An' whipped out a switch;

> > He wuz gone in a seccon';

> > Dat son of a bitch!!

> >

> > Next year I be hopin';

> > Anutha Sanna we git;

> > Cuz' diz here Sanna Clause;

> > Jus' ain't werf a shit!!!

> >

> > \_\_\_\_\_